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CHARLES F. BAYLEY

No. 581

In the Supreme Court of the United States

October Term, 1942.

SOUTHLAND GASOLINE COMPANY, *Petitioner,*

vs.

J. W. BAYLEY, HENRY V. BLOOM, G. C. KENDALL,
OWEN REDING AND W. J. BAYLEY, *Respondents.*

BRIEF OF PETITIONER.

CLAUDE H. ROSENSTEIN,

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(Emphases herein are ours.)

The Memorandum Opinion of the District Court (not reported) appears at pages 18 to 21 of the record; the Opinion of the Circuit Court of Appeals is reported as *Bayley, et al., v. Southland Gasoline Co.*, 131 F. (2d) 412.

Grounds on Which Jurisdiction of This Court Is Invoked.

The jurisdiction of this Court is invoked by petition for writ of *certiorari* pursuant to Tit. 28, Sec. 347(a), U. S. C. A. (26 Stat. 828, as amended by 36 Stat. 1157 and 43 Stat. 938). The petition for writ of *certiorari* including memorandum, supplementing petition for writ of *certiorari*, set forth the following grounds on which the jurisdiction of this Court is invoked to review the judgment and decision

of the Circuit Court of Appeals for the Eighth Circuit, to-wit:

(a) The decision of the Circuit Court of Appeals involves an important question of Federal law which has not been but should be settled by this Court.

(b) The decision of the Circuit Court of Appeals is a decision of a Federal question in a way probably in conflict with applicable decisions of this Court.

(c) The decision of the Circuit Court of Appeals is in conflict with the weight of authority and is contrary to uniform decisions of the District Courts in many of the circuits.

(d) The decision appealed from, by the Circuit Court of Appeals for the Eighth Circuit, is in conflict with a decision of the Circuit Court of Appeals for the Fourth Circuit on the same matter.

Statement of the Case.

This suit is a civil action filed January 2, 1942 (Rec. p. 1), by respondents, as plaintiffs, against petitioner, as defendant, in the District Court of the United States for the Western District of Arkansas.

The complaint filed in the District Court (Rec., pp. 1-16) alleged that the respondents were employees of the petitioner; that petitioner during the period of time between October 24, 1938, and October 15, 1940, was engaged in the gasoline business and in pursuance of that business purchased gasoline, automobile tires, batteries and automobile accessories in the State of Oklahoma and caused these articles to be loaded upon petitioner's trucks and transported to the State of Arkansas where petitioner sold them, at

wholesale, to retail establishments in the State of Arkansas, for resale to the general public; that petitioner each week loaded trucks in the State of Arkansas with automobile tires, accessories and automotive equipment and transported such articles to the State of Oklahoma where they were sold at wholesale to retail establishments in that state for resale to the general public; that petitioner in the conduct of its business operated and maintained trucks and engaged in trucking operations as "a private carrier"; that during all such time each of respondents was employed by petitioner as a truck driver and each respondent, in this capacity, drove petitioner's trucks each week from Arkansas to Oklahoma and from Oklahoma to Arkansas, which trucks were used by petitioner in carrying on its gasoline business. Respondents further alleged failure, on the part of the petitioner, to pay each of the respondents time and one-half for services performed by them, as such truck drivers, in excess of the maximum hours provided by the Fair Labor Standards Act.

Certain of the respondents (Henry V. Bloom, G. C. Kendall, and Owen Reding) also alleged a failure to pay the minimum wage provided by Section 6(a) of the Fair Labor Standards Act (Tit. 29, Sec. 206(a), U. S. C. A., 52 Stat. 1062). The claim of these respondents to recover minimum wages pursuant to Section 6(a) of the Fair Labor Standards Act, however, was not in controversy on the appeal to the Circuit Court of Appeals. The order of the District Court (Rec., pp. 21-23) from which the appeal was prosecuted to the Circuit Court of Appeals for the Eighth Circuit, sustained petitioner's motion to dismiss the complaint of respondents only as to their claim for overtime compensation under Section 7 of the Fair Labor Standards Act.

The District Court held (Rec., pp. 18-21) that respondents were not entitled to the benefits of Section 7(a) of the Fair Labor Standards Act (Tit. 29, Sec. 207(a), U. S. C. A., 52 Stat. 1063) because they were included within the exemption granted by Section 13(b)(1) of the Fair Labor Standards Act (Tit. 29, Sec. 213(b)(1), U. S. C. A., 52 Stat. 1067) exempting any employee "with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions" of Section 204 of the Motor Carrier Act of 1935.

The pertinent portion of the Motor Carrier Act of 1935 (being a part of Section 204(a) thereof) provides, in substance, that it shall be the duty of the Interstate Commerce Commission:

(1) To regulate common carriers by motor vehicle and to that end to establish qualifications and maximum hours of service of employees;

(2) To regulate contract carriers by motor vehicle and to that end to establish qualifications and maximum hours of service of employees; and

(3) To establish for private carriers of property by motor vehicle "if need therefor is found" reasonable requirements to promote safety of operation and to that end prescribe qualifications and maximum hours of service of employees.

It is the contention of respondents that the exemption prescribed by Section 13(b)(1) of the Fair Labor Standards Act is not applicable to employees of *private carriers* of property by motor vehicle until the Interstate Commerce Commission found that a need existed which authorized the Commission to *exercise* the authority granted it to prescribe qualifications and maximum hours of service of employees of private carriers of property by motor vehicle. On the

other hand, it is the contention of petitioner that the Commission at all times from and since the passage of the Fair Labor Standards Act had the "power" to establish qualifications and maximum hours of service of employees of private carriers of property by motor vehicle and that consequently such employees (to which class the respondents belong) were never subject to the overtime wage provision contained in Section 7(a) of the Fair Labor Standards Act. The District Court sustained petitioner's contention in this respect.

The respondents, as appellants, prosecuted an appeal from the decision and judgment of the District Court to the Circuit Court of Appeals for the Eighth Circuit, which court reversed the judgment and decision of the District Court. The appeal involved a construction of Sections 7(a) and 13(b) of the Fair Labor Standards Act and Section 304 of the Motor Carrier Act (Tit. 49, Sec. 304, U. S. C. A., 49 Stat. 546). The Circuit Court of Appeals held and decided (Rec., pp. 23-27) that the exemption contained in Section 13(b)(1) of the Fair Labor Standards Act 1938, did not apply to employees of private carriers until the Interstate Commerce Commission made a finding (on May 1, 1940) of the necessity for regulation of private carriers with respect to the matters specified in the Motor Carrier Act 1935.

Specification of Assigned Errors Intended to Be Urged.

1. The Circuit Court of Appeals erred in holding and deciding that the exemption contained in Section 13(b)(1) of the Fair Labor Standards Act (Tit. 29, Sec. 213(b)(1), U. S. C. A., 52 Stat. 1067), providing that Section 7 of the Fair Labor Standards Act (29 U. S. C. A., Sec. 207, 52 Stat. 1063) is not applicable to any employee "with respect to

whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service" pursuant to the provisions of Section 204 of the Motor Carrier Act of 1935 (Tit. 49, Sec. 304(a)(3), U. S. C. A.) did not apply to respondents until May 1st, 1940, on which date the Interstate Commerce Commission found that a need existed for the regulation of private carriers of property by motor vehicle.

2. The Circuit Court of Appeals erred in holding and concluding that respondents by their complaint, stated a claim for the recovery of overtime compensation pursuant to the provisions of the Fair Labor Standards Act of 1938.

ARGUMENT.

The complaint filed in this cause by respondents (Rec. pp. 1-16) sought recovery on behalf of respondents from petitioner of compensation, liquidated damages and attorneys' fees for failure to pay the statutory minimum wages and for failure to pay the statutory compensation for overtime as required by Sections 6 and 7 of the Fair Labor Standards Act of 1938.

The District Court sustained petitioner's motion to dismiss the complaint of respondents *as to the claims set forth therein for recovery on account of overtime. The question of recovery because of failure to pay minimum compensation (Section 6 of the Fair Labor Standards Act of 1938) was not involved in the decision of the District Court nor in the opinion and judgment of the Circuit Court of Appeals.*

The order of the District Court (Rec., pp. 21-23) from which the appeal was prosecuted to the Circuit Court of Appeals sustained petitioner's motion to dismiss the complaint of respondents as to the claims for overtime compensation under Section 7(a) of the Fair Labor Standards Act.

PROPOSITION I.

(Specifications of Error 1 and 2.)

The Act is not applicable to respondents' claim for overtime compensation because of the exemption contained in Section 13(b)(1) of the Fair Labor Standards Act of 1938.

The District Court held that the exemption contained in Section 13(b)(1) of the Fair Labor Standards Act of 1938 applied to respondents. The Circuit Court of Appeals in its opinion concluded that the exemption contained in Section 13(b)(1) was not applicable to respondents during the period of time in controversy in this action.

Section 13(b)(1) of the Fair Labor Standards Act provides that the provisions of Section 7 of the Act shall not apply with respect to any employee "with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions" of Section 204 of the Motor Carrier Act of 1935.

The respondents, according to the allegations of their complaint, were employees of a private carrier of property by motor vehicle, whose employment affected safety of operation.

The substantive issue presented to the Circuit Court of Appeals was:

Did the Interstate Commerce Commission have power

to prescribe qualifications and maximum hours of service for employees of private carriers of property by motor vehicle from the effective date of the Motor Carrier Act of 1935, or did that power not come into existence until May 1, 1940, on which date the Interstate Commerce Commission (*Ex parte* No. MC-3, Div. No. 5, Interstate Commerce Commission) determined that a need existed for regulation by the Commission, of private motor carriers engaged in interstate or foreign commerce?

The decision of the Circuit Court of Appeals, in our judgment, is bottomed on an erroneous conclusion concerning this question. Its correct solution determines whether the Circuit Court of Appeals rightly or wrongly decided.

It is the contention of petitioner, which contention, we believe, is supported by the great weight of authority, that the Interstate Commerce Commission *had power*, at all times subsequent to the approval of the Motor Carrier Act of 1935, to prescribe maximum hours of service and qualifications for the employees of private carriers of property by motor vehicle; that the Commission's right to *exercise* this power was based upon its finding of a need therefor, but that the *power* at all times existed. It is the further contention of petitioner that the exemption granted by Section 13(b)(1) of the Fair Labor Standards Act of all employees with respect to whom the Interstate Commerce Commission *had power* under the Motor Carrier Act to establish qualifications and maximum hours of service included at all times, such employees of private carriers of property by motor vehicle despite the fact that the Commission had not found the need for the *exercise* of this power and had not actually exercised the power so conferred upon it by the Motor Carrier Act, as to private carriers.

The Circuit Court of Appeals held the exemption of Section 13(b)(1) was not applicable to respondents solely and only because the Commission, at the time the Fair Labor Standards Act became effective, had not found and did not, until May 1, 1940, find that a need existed for the regulation of private carriers of property by motor vehicle. The question determined by the Circuit Court of Appeals for the Eighth Circuit has been decided, so far as we have been able to ascertain, by only one other Circuit Court of Appeals. The question, however, has been determined by a substantial number of United States District Courts. Except for the decision of the Circuit Court of Appeals for the Eighth Circuit, in this case, the decisions (including the decision of the Circuit Court of Appeals for the Fourth Circuit) are unanimous in holding that the exemption provided by Section 13(b)(1) applied at all times since the adoption of the Fair Labor Standards Act, despite the fact that it was not until May 1, 1940, that the Interstate Commerce Commission found that a need existed for the exercise of the power granted by Congress to regulate private carriers of property by motor vehicle.

The following decisions sustain the contention of petitioner:

Richardson v. The James Gibbons Company, No. 4964, United States Circuit Court of Appeals for the Fourth Circuit, decided December 26, 1942—not yet reported;

Faulkner v. Little Rock Furniture Mfg. Co., 32 F. Supp. 590 (D. C. E. D. Ark., April 9, 1940);

Bechtel v. Stillwater Milling Co., 33 F. Supp. 1010 (D. C. West. Dist. Okla., June 25, 1940);

Gerdert v. Certified Poultry & Egg Co., Inc., 38 F. Supp. 964 (D. C. So. Dist. Fla., Apr. 29, 1941);

West v. Smoky Mountains Stages, Inc., 40 F. Supp. 296 (D. C. N. D. Ga., August 5, 1941);

Gavril v. Kraft Cheese Co., (Fleming, Administrator of Wage and Hour Division, United States Department of Labor, Intervener) 42 F. Supp. 702 (D. C. N. D. Ill., November 27, 1941);

Robbins v. Zabarsky, 44 F. Supp. 867 (D. C. Mass., May 7, 1942);

Fitzgerald v. Kroger Grocery & Baking Co., 45 F. Supp. 812 (D. C. Kan., June 22, 1942);

Clarence Gibson v. Wilson & Company, 4 Labor Cases, No. 60466 (D. C. W. D. Tenn., March 20, 1941).

The Circuit Court of Appeals for the Fourth Circuit in *Richardson v. The James Gibbons Company*, No. 4964, not yet reported, gave consideration to the decision of the Circuit Court of Appeals for the Eighth Circuit in this case and concluded that it could not concur in the correctness of the decision of the Circuit Court of Appeals for the Eighth Circuit or in the validity of the reasons advanced therefor. The pertinent portion of the opinion (by Circuit Judge Dowie) of the Fourth Circuit Court of Appeals in *Richardson v. The James Gibbons Company*, *supra*, reads as follows:

But a more serious question arises in this case. The District Judge, though he may have done so inferentially, did not, in granting the motion to dismiss, pass expressly upon the question. At that time the case of *Bayley, et al., v. Southland Gasoline Co.*, (C. C. A. 8, Nov. 2, 1942) had not been decided.

The period of Richardson's employment by Gibbons extended from October 24, 1938, until September 4, 1940; the defendant, Gibbons, qualified and has operated under the rules and regulations of the Interstate

Commerce Commission since August 31, 1941. The Interstate Commerce Commission did not actually undertake the regulation of private motor carriers until May 1, 1940, when it made its finding that the regulation of private motor carriers was needed."

"In the *Bayley* case, *supra*, the Circuit Court of Appeals for the Eighth Circuit, speaking through Circuit Judge Riddick, after setting out the relevant provisions of the Motor Carrier Act (given above) said:

"It is apparent from a reading of the Motor Carrier Act that while the Congress determined for itself the necessity for the regulation of common and contract carriers by motor vehicle in the respects stated in the act, it did not determine the necessity of regulating private carriers by motor vehicle, such as the appellee here, but left the determination of that question to the Interstate Commerce Commission, if, in the words of the act, "need therefor is found." Obviously the three subsections of the act, read together, clearly imply the intention of Congress that the power of the Commission with respect to private carriers should depend upon a finding by the Commission that the regulation was needed; that is to say, needed in the public interest in order to make effective regulation of common and contract carriers which Congress commanded, and to protect the public and the common and contract carriers from the consequences of unregulated competition by private carriers."

"Then, after discussing the intent and purpose of the Fair Labor Standards Act, Judge Riddick continued:

"We hold that until the Interstate Commerce Commission made the finding of the necessity of the regulation of private carriers with respect to the matters specified in the Motor Carrier Act of 1935,

it was without power to prescribe either qualifications or maximum hours for the employees of such carriers.'

"With all due deference, and all proper respect, for the learning and authority of that court, we, regretfully, cannot concur in the correctness of its decision or in the validity of the reasons advanced for that decision. We think the interpretation given in the *Bayley* case to the Fair Labor Standards Act and the Motor Carrier Act overlooks the keen interrelation of these two statutes and defeats the intents and purposes which Congress had in mind.

"We are fully aware that the Motor Carrier Act, Sec. 204(a), gives absolute power to the Interstate Commerce Commission in paragraph (1) over common carriers by motor vehicle and in paragraph (2) over contract carriers by motor vehicle, while, as to private carriers of property by motor vehicle, there is in paragraph (3) the qualifying words 'if need therefor is found.' And such a finding is necessary before any affirmative and binding action can be taken by the Commission. Nor do we lightly brush aside the interpretation placed on the Fair Labor Standards Act by the Administrator in his Interpretative Bulletin No. 9. Yet we still think these considerations afford no valid basis for the *Bayley* decision.

"The real question here is the meaning of the word 'power' in Section 13(b) of the Fair Labor Standards Act. Congress, we think, meant the *existence* of the power *not its actual exercise*. The Fair Labor Standards Act was enacted after the Motor Carrier Act, and *the later statute, we believe, intended to draw a line of cleavage between those cases on which the Interstate Commerce Commission could take action and those cases on which it could not*. The restricted definition of the word 'employee' in *United States v. American Trucking Association*, 310 U. S. 534, would seem to lend

color to this view, and, we think we find in that opinion a reflection of the philosophy of the Fair Labor Standards Act and the Motor Carrier Act to which we adhere.

"We cordially agree with the opinion in the *Bayley* case that the Fair Labor Standards Act, as a remedial statute, must be liberally construed. This we developed at some length in *Missel v. Overnight Transportation Co.*, 126 F. (2d) 98. But *salus populi suprema lex esto* and we should be equally careful not to restrict unduly any federal statute which, in the interest of public safety, undertakes to clothe the Interstate Commerce Commission with power to encompass so worthy an end. The vast importance of the private carrier of goods by motor vehicle is too well known to require comment. Congress must have appreciated this. We think, accordingly, that Congress was pretty well convinced that the Interstate Commerce Commission would (as it did) make a finding of the necessity of regulating these carriers. Any other finding would have been little less than shocking to the American public.

"The *Bayley* decision gives to coverage under the Fair Labor Standards Act a gap or hiatus in time, a kind of period of suspended animation to this same status of coverage. It makes certain employees subject to this act and then, a moment later when the Interstate Commerce Commission has made the finding of necessity, the coverage of the act suddenly ceases. We hesitate to think that Congress deliberately undertook to bring about such a situation, with all the pains, penalties and uncertainties thereunto appertaining. Again the Fair Labor Standards Act was never drawn with the idea of making a complete coverage of all employees engaged in interstate transportation. By its terms a number of exceptions are made, such as fishermen and farmers.

"Our own researches, and those of counsel, have failed to turn up any decision of a Circuit Court of Appeals with the exception of the *Bayley* case, passing directly on the instant question. Under the circumstances, we advert briefly to opinions in the Federal District Courts, all of which buttress the stand we take in the instant case."

The gist of the decisions of the eight United States District Courts, hereinbefore cited, is concisely stated in the fifth paragraph of the syllabus of *Gavril v. Kraft Cheese Co.*, (Fleming, Administrator of Wage and Hour Division, United States Department of Labor, Intervener) 42 Fed. Supp. 702, (D. C., N. D., Ill.) which reads:

"Under Fair Labor Standards Act providing that section limiting hours of work and defining rate of overtime compensation shall not apply with respect to any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service under the Motor Carrier Act, driver-salesmen of employer engaged on a national scale in the manufacture and distribution at wholesale of cheese and other food products were excluded from the wage and hour provision of the Fair Labor Standards Act *regardless of the time at which the Interstate Commerce Commission exercised its power to establish qualifications and maximum hours of service for such employees.*"

The decision of the Circuit Court of Appeals, is based in part on the authority of Interpretative Bulletin No. 9, (United States Department of Labor, Wage and Hour Division—originally issued March, 1939). This bulletin states that it is the administrator's opinion that until an order is issued by the Interstate Commerce Commission, finding the need for regulation, "employees of private carriers should

be considered as not within the exemption provided by Section 13(b)(1).” The following important preface to Interpretative Bulletin No. 9, however, should be considered. It reads:

“The scope of the exemption provided in Section 13(b)(1) involves the interpretation not only of the Fair Labor Standards Act but also of Section 204 of the Motor Carrier Act, 1935. *The act confers no authority upon the Administrator to extend or restrict the scope of the exemption provided in Section 13(b)(1) or even to impose legally binding interpretations as to its meaning. This bulletin is merely intended to indicate the course which the Administrator will follow in the performance of his administrative duties until otherwise required by authoritative ruling of the courts.*” (Par. 2, Int. Bull. No. 9)

The above statement is particularly enlightening when it is remembered that the Administrator intervened in the case of *Gavril v. Kraft Cheese Co., supra*; that the court “otherwise” determined the interpretation of the exemption granted by Section 13(b)(1) in that case, and that *no appeal was taken from that decision, but it was allowed to and has become final.*

The Circuit Court of Appeals bases its opinion, in part, also on certain decisions of this court. The pertinent portion of the opinion of the Circuit Court of Appeals, including the citation of the cases relied upon, reads:

“The rule is that where the legislature invests an administrative body or other agency of the government with power to act on or in accordance with a hearing or a finding, the delegated power does not come into existence until the hearing is had or the determination is made. In such circumstances a finding is jurisdictional and action without the finding is void. *Panama*

Refining Co. v. Ryan, 293 U. S. 388, 431, 55 Sup. Ct. 241, 79 L. ed. 446; *United States v. B. & O. Ry. Co.*, 293 U. S. 454, 462, 55 Sup. Ct. 268, 79 L. ed. 587; *Mahler v. Eby*, 264 U. S. 32, 44 Sup. Ct. 283, 68 L. ed. 549; *Wichita Railroad & Light Co. v. Public Utilities Commission*, 260 U. S. 48, 43 Sup. Ct. 55, 67 L. ed. 124."

The interpretation of the above cited decisions of this Honorable Court by the Circuit Court of Appeals is, in our humble judgment, in conflict with the decisions actually rendered by this Honorable Court in these cases and constitutes the decision of a Federal question in a way probably in conflict with applicable decisions of this court. The decisions of this court above referred to, instead of holding that where the Legislature invests an administrative body or other agency of the Government with *power* to act on or in accordance with a hearing or a finding, the delegated *power* does not come into existence until the hearing is had or the determination is made, on the contrary hold that the *power* at all times exists in the administrative body or other agency of the Government, but that it is a condition to the exercise of this power that such finding or determination be made.

For instance, in *Mahler v. Eby*, *supra*, Mr. Justice TAFT in the court's opinion in that case said:

"It is essential that where an executive is exercising delegated legislative power he should substantially comply with all the statutory requirements in its exercise, and that, if his making a finding is a condition precedent to this act, the fulfillment of that condition should appear in the record of the act."

None of the above cases holds that *power* delegated by the Legislative Department, to be exercised on the finding of the existence of certain facts, is not at all times from and after the passage of the act vested in the Administrative

body or other governmental agency, but they do hold that the power can only *be exercised* upon a proper finding of the conditions under which the legislative branch of the Government has authorized the *power* to be exercised.

The fundamental fallacy of the decision of the Circuit Court of Appeals lies in the fact that the court confuses "power" with *the conditions under which that power may be exercised*. If the Fair Labor Standards Act of 1938 by the provisions of Section 13(b)(1) had exempted employees as to whom the Interstate Commerce Commission *had prescribed* qualifications and maximum hours of service, then the decision of the Circuit Court of Appeals would be well founded, *but the act does not so define the exemption*.

The fact that by the terms of the Motor Carrier Act the Interstate Commerce Commission is not to *exercise its power* to prescribe qualifications and maximum hours of service for employees of private carriers of property by motor vehicle, until need therefor is found, *does not mean that the Interstate Commerce Commission was not at all times vested with such power*, any more than it can be properly said that a court of general equity jurisdiction does not at all times have *power* to appoint receivers because of the fact that the power to make such appointments will be exercised only when the court determines the existence of conditions or circumstances under which a need therefor exists.

The proper interpretation of the clause "if need therefor is found" is well expressed by District Judge Boyd in his findings of fact and conclusions of law, filed in the case of *Clarence Gibson v. Wilson & Company*, decided by him as Judge of the District Court for the Western Division of the the Western District of Tennessee on March 20, 1941, 4

Labor Cases (Commerce Clearing House) No. 60,466. Conclusion of Law No. VII reads:

"The words 'if need therefor is found,' in Section 204(a) (3) of the Motor Carrier Act, 1935, constitute a restriction and limitation upon the exercise by the Commission of the power granted to it to regulate maximum hours and qualifications of service of truck drivers of private carriers, but do not restrict or limit the power granted to the commission so to regulate the maximum hours and qualifications of service of such employees."

This court had occasion to consider the power of the Interstate Commerce Commission, under the Motor Carrier Act of 1935, to establish qualifications and maximum hours of service of employees of motor carriers, in the case of *United States v. American Trucking Associations*, 310 U. S. 534-553, 60 Sup. Ct. 1059, 84 L. ed. 1345. In that case it was held that the employees with respect to whom the Interstate Commerce Commission had power to establish qualifications and maximum hours of service pursuant to the provisions of Section 204 of the Motor Carrier Act of 1935 were those employees whose duties affect safety of operation. (Respondents are all truck drivers and they are concededly employees whose duties affect safety of operation). It is true that the decision of this court in *United States v. American Trucking Associations*, *supra*, was concerned only with employees of common and contract carriers by motor vehicle, but it also seems evident, from the opinion in that case, that the court concluded that the power of the Commission extended equally to employees of common, contract and private carriers. It was the contention of appellees in the *American Trucking Associations* case that the difference in language between Sub-sections (1) and (2) and Sub-section (3) of Section 204 of the Motor Carrier Act was indicative

of a Congressional purpose to restrict the regulation of employees of private carriers to "safety of operation" while giving broader authority as to employees of common and contract carriers. This court rejected that contention and in the course of its opinion, delivered by Mr. Justice REED, among other things, said:

"The Senate Committee's report explained the provisions of Sec. 204(a) (1), (2), 49 U. S. C. A., Sec. 304(a) (1), (2) as giving the Commission authority over common and contract carriers *similar to that given over private carriers* by Sec. 204(a) (3), 49 U. S. C. A., Sec. 304(a) (3)."

Again, in the opinion, in discussing an amendment to Section 203 of the Motor Carrier Act, providing an exemption of certain motor vehicles from the provisions of the act, except the provisions of Section 204 thereof, this court said:

"It is evident that the exempted vehicles and operators include common, contract and private carriers."

We, therefore, believe the proper interpretation of this court's decision in *United States v. American Trucking Associations, supra*, leads to the conclusion that the power of the Interstate Commerce Commission to prescribe qualifications and maximum hours of service of "employees" extends alike to employees of common, contract and private carriers and that the only limitation upon the power of the Commission is that delineated by this court in the above mentioned decision, to-wit, that the power of the Commission is limited to employees whose duties affect safety of operation.

It is true that the conditions under which the Commission may exercise its power as to employees of private car-

riers are restricted further by the fact that the Commission must find a necessity for such regulation, but this is not a limitation upon the Commission's *power*, but a condition upon which the power *may be exercised*.

We, therefore, conclude that the Circuit Court of Appeals for the Eighth Circuit, by its decision in this case, erroneously decided that respondents were not exempt from the overtime provisions of the Fair Labor Standards Act and that such judgment and decision should be reversed.

Respectfully submitted,

CLAUDE H. ROSENSTEIN,
Attorney for Petitioner.